

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JULIAN LOZANO,

Plaintiff,

vs.

DR. TATE, et al.,

Defendants.

1:05-cv-00552-AWI-DLB-P

**FINDINGS AND RECOMMENDATIONS
RE DISMISSAL OF ACTION FOR
FAILURE TO OBEY A COURT ORDER
AND FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE
GRANTED (Doc. 16)**

Plaintiff, Julian Lozano ("plaintiff"), is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

By order filed August 29, 2006, the court found that plaintiff's amended complaint failed to state any claims for relief against the named defendants. The court dismissed plaintiff's amended complaint and ordered plaintiff to file a second amended complaint within thirty (30) days from the date of service of that order. More than thirty days have passed and plaintiff has not filed a second amended complaint or otherwise responded to the court's.¹

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¹ The United States Postal Service returned the order served on plaintiff on September 6, 2006, as undeliverable. A notation on the envelope indicated: **Return to Sender - Died.**

1 Local Rule 11-110 provides that "failure of counsel or of a
2 party to comply with these Local Rules or with any order of the
3 Court may be grounds for the imposition by the Court of any and all
4 sanctions . . . within the inherent power of the Court." District
5 courts have the inherent power to control their dockets and "in the
6 exercise of that power, they may impose sanctions including, where
7 appropriate . . . dismissal of a case." Thompson v. Housing Auth.,
8 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action,
9 with prejudice, based on a party's failure to prosecute an action,
10 failure to obey a court order, or failure to comply with local
11 rules. See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
12 1995) (dismissal for noncompliance with local rule); Ferdik v.
13 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for
14 failure to comply with an order requiring amendment of complaint);
15 Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for
16 failure to comply with local rule requiring pro se plaintiffs to
17 keep court apprised of address); Malone v. U.S. Postal Service, 833
18 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with
19 court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.
20 1986) (dismissal for failure to lack of prosecution and failure to
21 comply with local rules).

22 In determining whether to dismiss an action for lack of
23 prosecution, failure to obey a court order, or failure to comply
24 with local rules, the court must consider several factors: (1) the
25 public's interest in expeditious resolution of litigation; (2) the
26 court's need to manage its docket; (3) the risk of prejudice to the
27 defendants; (4) the public policy favoring disposition of cases on
28 their merits; and, (5) the availability of less drastic

1 alternatives. Thompson, 782 F.2d at 831; Henderson, 779 F.2d at
2 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at 1260-61;
3 Ghazali, 46 F.3d at 53.

4 In the instant case, the court finds that the public's
5 interest in expeditiously resolving this litigation and the court's
6 interest in managing the docket weigh in favor of dismissal. The
7 third factor, risk of prejudice to defendants, also weighs in favor
8 of dismissal, since a presumption of injury arises from the
9 occurrence of unreasonable delay in prosecuting an action.
10 Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth
11 factor -- public policy favoring disposition of cases on their
12 merits -- is greatly outweighed by the factors in favor of
13 dismissal discussed herein. Finally, a court's warning to a party
14 that his failure to obey the court's order will result in dismissal
15 satisfies the "consideration of alternatives" requirement. Ferdik
16 v. Bonzelet, 963 F.2d at 1262; Malone, 833 at 132-33; Henderson,
17 779 F.2d at 1424. The court's order of August 29, 2006, requiring
18 plaintiff to file a second amended complaint, expressly stated:
19 "The failure to file a second amended complaint that complies with
20 this order will result in a recommendation that this action be
21 dismissed." Thus, plaintiff had adequate warning that dismissal
22 would result from non-compliance with the court's order.

23 Accordingly, it is HEREBY RECOMMENDED that this action be
24 DISMISSED for plaintiff's failure to obey the court's order of
25 August 29, 2006, and for the reasons set forth therein, namely, for
26 failure to state a claim upon which relief may be granted.

27 These Findings and Recommendations are submitted to the United
28 States District Judge assigned to the case, pursuant to the

1 provisions of Title 28 U.S.C. § 636(b)(1). Within **eleven (11) days**
2 after being served with these Findings and Recommendations,
3 plaintiff may file written objections with the court. Such a
4 document should be captioned "Objections to Magistrate Judge's
5 Findings and Recommendations." Plaintiff is advised that failure
6 to file objections within the specified time may waive the right to
7 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
8 (9th Cir. 1991).

9 IT IS SO ORDERED.

10 **Dated: November 30, 2006**
11 3c0hj8

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE